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IN THE

Supreme Court of The United States

October Term, 1960

Number [redacted] ///

FULLER HOLT, CLAUDE HOLT, MILTON JAMES HOLT, FRANK T. KEENER, E. D. HOLT and MRS. E. D. HOLT,

Petitioners in Certiorari

versus

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

WESLEY R. ASINOF
Attorney for Petitioners
419 Atlanta National Bldg.
Atlanta 3, Georgia

IN THE

Supreme Court of The United States

October Term, 1960

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FULLER HOLT, CLAUDE HOLT, MILTON JAMES HOLT, FRANK T. KEENER, E. D. HOLT and MRS. E. D. HOLT,

Petitioners in Certiorari

versus

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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Now come petitioners, and petition this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Appellants Fuller Holt, Claude Holt, Milton James Holt, Frank T. Keener, E. D. Holt and Mrs. E. D. Holt were jointly indicted, along with seven other persons who were acquitted by the jury, for conspiring to violate

the internal revenue laws of the United States relating to the manufacture, possession and concealment of non-tax paid distilled spirits and related substantive offenses. All the named appellants were found guilty by the jury on count number one, charging conspiracy. Appellant Fuller Holt was found guilty on count number three charging him with possession of property intended for use in the manufacture of non-tax paid distilled spirits. Appellants E. D. Holt and Mrs. E. D. Holt were found guilty on count number five charging them with possessing property intended for use in the manufacture of non-tax paid distilled spirits. Appellants E. D. Holt and Mrs. E. D. Holt were found guilty on count number seven charging them with possessing 480 gallons of non-tax paid distilled spirits. Appellants E. D. Holt, Fuller Holt and Milton James Holt were found guilty on count number eight charging them with possessing an unregistered still.

The evidence, construed most favorably for the Government, revolved around the operation of three distilleries. The first still was set up, according to the evidence, about December 25, 1958, in Murray County, Georgia. This still was seized by Government agents on January 20, 1959, on information reported by co-conspirator J. H. Padgett to Duff Floyd, one of the Government agents and witnesses. Insofar as the operation of this distillery was concerned the evidence shows the following defendants to have been the only persons named in connection therewith:

(1) J. H. Padgett, (2) Austin Lowman, (3) E. D. Holt, (4) James Wofford, (5) Claude Call, (6) Roose-

velt Keener, (7) Austin Whitaker, (8) Frank Keener, (9) Fuller Holt and (10) Claude Holt.

This distillery, according to the evidence, ceased operation after its seizure by the federal agents.

The second distillery, located in Gilmer County, Georgia, was set up during March, 1959, and lasted only two or three weeks. The following alleged conspirators were concerned in the operation of this distillery:

(1) J. H. Padgett, (2) Horace Parks, (3) Milton Holt, (4) E. D. Holt and (5) Claude Call.

This distillery, according to the evidence, ceased operating sometime during March, 1959.

The third distillery, located at what was called the Old Cicero Wright place, in Gilmer County, Georgia, began to function about April 29, 1959, and ceased operating on May 17, 1959. The alleged conspirators in that transaction were as follows: (1) J. H. Padgett, (2) Claude Call, (3) E. D. Holt, (4) Milton Holt, (5) Fuller Holt, (6) Mrs. E. D. Holt, (7) Claude Holt and (8) Doyle Evans.

J. H. Padgett, alleged in the indictment as a co-conspirator, but not as a defendant, testified on behalf of the Government as a witness.

Padgett's testimony developed the following facts: That the witness went to work at still No. 1 located in Murray County about December 26th, 1958, and that the parties named above were involved in that still; that the witness became dissatisfied and shortly thereafter he contacted Investigator Floyd; that on January 20, 1959, pursuant to his information, the still was destroyed by

federal agents; that the witness was paid $76.00 for this information (R. 93). At the time Investigator Floyd paid Padgett $76.00 Padgett told Floyd he had been helping to make liquor, (R. 94) but Floyd did not discuss whether or not Padgett would be prosecuted for it. Padgett was to get paid more money "to get the Holt gang," (R. 95), that Padgett did not know what his "remuneration" would be, but that he knew "it would be right," (R. 96). Another Government agent, Warren Cagle, testified that the "purpose of paying" such money is "in return for information or help to the Government," and that "it has to lead to the seizure, it is a form of contract between this person and the Government that he will perform certain services, and these services have to be terminated or his obligation met before he is paid," and that "usually the officer to whom the person contracts has the judgment and the authority to make the contract between the Government and the agent" (R. 230). Padgett was not prosecuted for working at any of these distilleries "*because he was paid by the Government to work at and help to operate the distillery*" (R. 242), Padgett was being paid by the Government to assist in the operation of the still, and the federal agents met with Padgett on some of the occasions to learn of their own "knowledge what the plans for the operation of the distillery and all the related activities, find when they were going to take place and such" (R. 243). The agents involved in the contacts between Padgett and the Government were Investigators Floyd, Davis and Cagle, and all three of the investigators at the time "were acting in behalf of the United States," (R. 244) and Padgett was advised by one of the agents that he "*might be prosecuted for setting up or assisting in the operation of a still at that time,*" (R. 244).

The federal agents knew about the third still located at the Old Cicero Wright place, and were observing it all the time from the time the shed was built by Padgett because Padgett had constant contact with them. (R.84) After the seizure of still No. 1 on January 20, 1959, Padgett left and did not work any more for the alleged conspirators until after March 1st, (R. 106) so the transaction after March 1st involving still No. 2 was an entirely separate and distinct transaction, (R. 107) involving different persons.

During the month of March, 1959, Padgett moved away from the location of the still in Murray County, designated as still No. 2, and "that was the end of that agreement that (he) had had with those people"; (R. 111). Padgett then moved back to Dawson County. During all three of these separate transactions Padgett was getting paid ten cents a gallon to make liquor and he was "*also getting paid from the Government.*" (R. 114.)

At the conclusion of the evidence for the Government the appellants all moved for judgments of acquittal which were overruled by the court.

The United States Court of Appeals for the Fifth Circuit, in affirming the convictions, held that the petitioners' contention that the participation of a "paid government informer in their illegal activities" does not estop the government from prosecuting them, even though the government agents were themselves conspiring with and paying a government informer who was alleged in the indictment as a co-conspirator, and held that "What the government paid for, and what it received in this case was information." The Court of Appeals then held: "We find nothing in the eliciting and utiliza-

tion of this information which should estop this prosecution."

The Court of Appeals also held that the evidence disclosed one conspiracy to produce "moonshine", and that it did not disclose three separate conspiracies so as to make the joinder in one count prejudicial to those defendants who were not implicated in all the phases of the alleged operation.

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on March 23, 1961. A petition for rehearing was denied on April 25, 1961. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S.Ct. XXXIX.)

(b) The statute of the United States, the validity of which is involved in this application for certiorari, is as follows:

> 18 U.S.C.A. #371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES
>
> If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) This petition for certiorari is being filed in this

Court within 30 days from the date of the judgment denying the petition for rehearing.

(d) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal l concerning conspiracy prosecutions so as to permit the government to become a party to a conspiracy without estopping the government from using their own paid agents and informers acts against other named conspirators.

THE QUESTIONS PRESENTED

1. Whether the government will be permitted to successfully prosecute and convict persons on a conspiracy to defraud the government charge where government agents and paid government informers were parties to such conspiratorial agreement; named in the indictment as co-conspirators and advising and assisting in the commission of the substantive offenses and objects of such conspiracy, or is the government estopped from such prosecution because of their participation and financial aid in such scheme?

2. Is a conviction valid on a one count conspiracy charge, where the evidence shows three separate and distinct conspiracies, with different sets of conspirators in each, instead of a single, continuous and uninterrupt[illegible] scheme or agreement?

ARGUMENT

The evidence in the case clearly indicates that federal agents employed J. H. Padgett to work with petitioners and to assist them in the setting up and operating of illicit stills. The government charges Padgett in the indictment with being a co-conspirator. This is not a case of mere entrapment, where the same rules should apply, but is a case where the government seeks to uphold a conviction against these petitioners for conspiring to do that which the government itself sanctioned and furthered.

While there is no case in point from this court holding this to be the federal law it was held in the case of *Butts* v. *United States*, 273 Fed. 35, that

> "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

The testimony in the case shows that Padgett was being paid by the government agents *to assist in the operation of a distillery*. The government argues that this was nothing more than furnishing the opportunity to persons who were ready, willing and able to violate the law, but not only did the government offer the opportunity; they also furnished the man power to build the instrument of crime without which no offense would or could have been committed; namely, the erection of the still.

The evidence clearly shows that Padgett was under an expressed government contract *to assist the petitioners in the erection of one of the stills*, and for that reason his offense is pardoned as being in the nature of *the*

commandment of the law, but the party or parties who assisted him in the other details of the building of the illegal device must be punished by that same government in order to suffer the consequences of the government's wrongful and illegal scheme.

It is illogical to hold one responsible for the acts of others who are aiding and abetting them, and at the same time hold the aider and abetter blameless because he was an aider and abetter of the sovereign.

If Padgett committed no crime because his sovereign commanded him to do the acts otherwise prohibited, how can that same sovereign complain that others aided him in carrying out their wishes? Padgett's plan in agreeing to violate the internal revenue laws was that of the government, and carried with it the authority of law. This made the government a co-conspirator in whatever plan or scheme was contemplated by all. Padgett's action in building the still and helping to set it up and operate it was the action of the government, and also carried with it the authority of the law, and if in so doing Padgett was aiding and abetting the owners of the still to operate it, the government was also an aider and abetter in its operation and was equally guilty. How can that same Government seek retribution against some, and pay bounty to others for those acts which they themselves have participated equally.

As to those defendants whose connection with such a scheme did not take place until after the Government agents had entered the case and as to that evidence which the jury must of necessity have had to consider, after the events of January 20, 1959, there is no fair way to separate them. To say on the one hand that it is for the jury to consider whether appellants were innocent per-

sons who had been seduced into committing a crime by government officials, and yet on the other hand find as a matter of law that the government had become part and parcel of the illegal scheme, condoning its every move and sanctioning its progress, is, to say the least, incompatible and illogical. Under such circumstances as these, as a matter of law, the government is estopped from prosecuting these appellants for the government does not come into court with clean hands. To hold in this case that these appellants are guilty of crime is to concede that the government has committed crime, for the appellants' acts are those of the government. It is not necessary that the Government should have entered the conspiracy from the start in order to charge them with responsibility as a member. *Lile* v. *United States*, 264 Fed. 2nd, 278, held as follows:

> "A person may be held as a conspirator although he joins the criminal concert at a point in time far beyond the initial act of the conspirators. If he joins later, knowing of the criminal design, and acts in concert with the original conspirators, he may be held responsible, not only for everything which may be done thereafter, but also for everything which has been done prior to his adherence to the criminal design." See also:

Marino v. *United States*, 91 Fed. 2nd, 691;
Poliafico v. *United States*, 237 Fed. 2nd, 97.

If the government agents, upon learning of the existence of the illegal plan on January 20th, 1959, made their seizure, using such evidence as was then available to them or such other evidence as they would have been able to discover from a further investigation of past and present events, no estoppel would have existed against the government, even though Padgett was a con-

spirator, for at that time Padgett was not in the employ of the government and they would not have had to claim responsibility for his unlawful acts. A jury trying that case would have heard all the evidence produced by the government, including the testimony of Padgett, and could have arrived at a verdict untainted by the evidence discovered as a result of the illegal actions of the government agents following their having joined the conspiracy.

In the case of *O'Brien* v. *United States*, 51 Fed. 2nd, 674, it was held by the United States Court of Appeals for the Seventh Circuit that:

> "the use of decoys to induce others to join an unlawful conspiracy originated by the government for the purpose of securing the violation of laws by others"

is prohibited by federal law.

While in the case at bar the government agents did not join the conspiracy until after it had commenced, their entry on or about January 20, 1959, and their consent to continue the unlawful enterprise after that date, luring some of the petitioners who had not joined it until after that, made the government "responsible" in law "for everything which has been done" prior to their entry.

This is the rule imposed upon individuals, according to the conspiracy doctrine. Those who join a conspiracy after it has commenced become responsible for the original conspiracy.

> "We see no reason why the government should not be subjected to the same rule of conduct. Although it be a sovereign, it should not be permitted to adopt means which are condemned by the courts when practiced by its citizens. It may not be sued

save with its consent, it is true, but if it comes into court, it is as a litigant."

O'Brien v. *United States*, supra

The offense of conspiracy and related offenses where Padgett was involved as an aider and abetter would never have been completed had it not been for the actual labor and agreement of Padgett, and ultimately the Government. Padgett, according to the evidence, helped to set up the still. He had also entered into the very agreement which is made the gist of the conspiracy charge against these appellants.

> "The defense (entrapment) is available if the entrapping officer or person performs any of such essential acts. Nothing done by the entrapping person, who is present with the knowledge and consent of the victim, will be imputed to accused and the prosecution will fail if it is necessary that something done by such person should be imputed to accused in order to constitute the offense." *22 Corpus Juris Secundum*, Criminal Law No. 45 (b), p. 104.

How then can Padgett's participation in the operation or building of the distillery be imputed to the Appellants, when Padgett was at that time the employee of the Government? How, also, can Padgett's agreement with any of the Appellants be imputed to them as unlawful when it carried the sanction of the Government? Padgett's agreement with some of the Appellants was essential to the Government's case because without it there would have been no conspiratorial agreement. Padgett's agreement therefore was an "essential act" necessary to constitute an offense against Appellants. Padgett's labor in building the shed and erecting the still and making the liquor which was the end product

were all "essential acts" necessary to be performed to constitute the offense charged in the still count.

Respectfully Submitted,

WESLEY R. ASINOF
Attorney for Petitioners
419 Atlanta Nat. Bldg.
Atlanta 3, Georgia

APPENDIX A

JUDGMENT

Extract from the Minutes of March 23, 1961

No. 18510

FULLER HOLT, ET AL.,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEROF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18510

FULLER HOLT, ET AL.,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(March 23, 1961.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

PER CURIAM: This is an appeal from convictions for conspiracy and various substantive counts of "moonshining".

Appellants' principal contention is that the participation of a paid government informer in their illegal activities estops the government from prosecutng them. The record clearly establishes that the government agent did not seduce otherwise innocent persons to violate the law. See *Park* v. *United States*, 5 Cir., 1960.

283 F.2d 253. Rather, the informants participation in their illegal activities was at the behest of the defendants in each instance. What the government paid for, and what it received in this case was information. We find nothing in the eliciting and utilization of this information which should estop this prosecution.

Appellant, Mrs. E. D. Holt, argues that there was insufficient evidence to support her conviction on counts 5 and 7 of the indictment. Her sentence of three years on probation could properly have been imposed as a result of her conviction under count 1. See 18 USCA 371. Where the evidence is sufficient to support a conviction on one count and the total sentence imposed does not exceed the maximum which may be imposed under that count, we will not consider the sufficiency of the evidence as to other counts. *Barenblatt* v. *United States*, 1959, 360 U. S. 109, 115.

The last point on appeal is that the evidence discloses three separate conspiracies, each revolving around the operations of a single still, rather than one general conspiracy. We think that the evidence discloses one conspiracy to produce "moonshine" and the intermittent operations of the respective stills were all in pursuance of that end.

The judgment of the court below is AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES

Deputy

New Orleans, Louisiana May 5, 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 991

FULLER HOLT, CLAUDE HOLT, MILTON JAMES HOLT, FRANK T. KEENER, E. D. HOLT, AND MRS. E. D. HOLT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 288 F. 2d 447.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1961 (Pet. App. A). A petition for rehearing was denied on April 25, 1961. The petition for a writ of certiorari was filed on May 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that one of the co-conspirators was a paid government informer constituted unlawful entrapment in the circumstances of this case.

2. Whether the evidence is sufficient to sustain a finding of one continuing conspiracy.

STATEMENT

The six petitioners and seven others were indicted in the Northern District of Georgia for conspiring to violate the internal revenue laws of the United States relating to the manufacture, possession, and concealment of non-tax-paid distilled spirits, and substantive offenses related to the conspiracy. All six petitioners were found guilty on the conspiracy count. Fuller Holt was also found guilty of having in his possession 680 pounds of sugar, intended for use in the manufacture of non-tax-paid distilled spirits (26 U.S.C. 5686). E. D. Holt and Mrs. E. D. Holt were found guilty of having in their possession 1,460 pounds of sugar, intended for use in the manufacture of non-tax-paid distilled spirits (26 U.S.C. 5686), and having in their possession 480 gallons of non-tax-paid whiskey (26 U.S.C 5008). In addition, Fuller Holt, Milton Holt and E. D. Holt were convicted for possession of a non-registered distillery (26 U.S.C. 5601). The other seven defendants were acquitted in all respects.

Fuller Holt and E. D. Holt were sentenced to fifteen months imprisonment, and Claude Holt and Milton James Holt to twelve months imprisonment. Mrs. E. D. Holt and Frank Keener were placed on three years probation.

The evidence leading to these convictions may be summarized as follows:

In December 1958, one Lowman informed Padgett that petitioner E. D. Holt wanted the two of them to work at a distillery located in Murray County, Georgia.[1] (Tr. 33, 35) Padgett and Lowman then spent the night at E. D. Holt's home, where the matter of working at the still was discussed further (Tr. 33–34, 36–37, 89). Padgett testified that he, Lowman and one Wofford worked at this still for two days beginning December 26, 1958, and that he was paid ten cents a gallon by E. D. Holt (Tr. 37, 48). Padgett and the two others then walked to petitioner Keener's home and Keener drove all three back to E. D. Holt's house (Tr. 40–41).

Two days later, Padgett returned to E. D. Holt's house and met petitioners Fuller Holt and Claude Holt, father and brother of E. D. Holt (Tr. 41–42). Padgett's testimony also showed that petitioner Mrs. E. D. Holt had stated in his presence that she had gone to Gainesville to pick up a load of coke and boiler glass for the still (Tr. 86–87). During that same evening, Fuller Holt and Claude Holt loaded some malt on E. D. Holt's truck (Tr. 42). E. D. Holt and Padgett proceeded to transport the malt to the Murray County still site, but first stopped at petitioner Keener's home where fifty-seven cases of

[1] Three still sites are involved in this case. Still number one was located in Murray County and will be referred to as the Murray County still. Still number two was located in Gilmer County and will be referred to as the Gilmer County still. Still number three was located on the Cicero Wright place and will be referred to as the Cicero Wright still.

non-tax-paid whiskey were picked up for redistilling (Tr. 43–45). Approximately forty to fifty cases of distilled spirits were manufactured at the still the following day (Tr. 46).

In the early part of January 1959, operations at the Murray County still were terminated and Padgett was told that his services would be needed at another still yet to be set up (Tr. 549).

On or about January 18, 1959, Padgett, of his own volition, contacted Alcohol and Tobacco Tax investigator Duff L. Floyd and told the agent of the distilling activities in which he (Padgett) had participated (Tr. 93, 361). Padgett was paid $75.00 for the information, and an arrangement was made whereby he would receive further pay for more information regarding "the Holt gang" (Tr. 95, 362). No promises regarding any future prosecution for his part in the distillery operations were made (Tr. 94–95, 116); instead, he was warned that he could be prosecuted for his role in the illegal activities (Tr. 127, 244, 326–328, 386).

On the evening of January 20, 1959, two federal agents, accompanied by a state revenue agent, went to the distillery site described by Padgett and found it partially dismantled (Tr. 145–146, 148). The next morning the agents proceeded to the home of petitioner Keener and discovered 120 gallons of non-tax-paid whiskey stored in a bedroom (Tr. 147). The officers subsequently destroyed both the distillery and the whiskey (Tr. 147–148).

In March 1959, Padgett was contacted by petitioners E. D. Holt and Milton Holt to help set up a

still in Gilmer County on the property of Horace Parks (Tr. 49, 51). These three men set up a steam-type distillery (Tr. 50), but only Padgett and Milton Holt ran the actual operation (Tr. 53). On several occasions, E. D. Holt brought raw materials to the site (Tr. 54). Some 300 cases of whiskey were manufactured at this still (Tr. 55), but some two weeks thereafter the site was abandoned because of dissatisfaction with the property owner, Horace Parks (Tr. 54–55, 111). Padgett did not contact the federal agents during this period because the still did not "last long enough" (Tr. 111).[2]

Shortly after the Gilmer County still had been abandoned in the first part of April, Padgett was again contacted by petitioners E. D. Holt and Milton Holt (Tr. 57). He was asked to move his family to the Cicero Wright estate and operate a distillery there, and he agreed to do so (Tr. 58–60). E. D. Holt arranged that Padgett lease the property as "Fred Wilson" (Tr. 60–63). Padgett moved into the Cicero Wright place around April 10, 1959, and on April 20, 1959, he, together with petitioners Milton Holt, E. D. Holt, and Claude Holt, built a still on the premises (Tr. 67–68). The electric burner was the same one used in the Murray County still, and was brought to the Cicero Wright place by E. D. Holt (Tr. 70–71). Once the distillery apparatus was set up, Padgett, with the aid of Milton Holt, operated the still (Tr. 72).

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[2] Subsequent investigation, in September 1959, by federal agents corroborated the fact that a distillery had been in operation on Parks' property (Tr. 148–151).

On April 29, 1959, internal revenue agents located this still site, and talked to Padgett near the still (Tr. 152–153). Thereafter, they kept the still site, the Fuller Holt residence, and the E. D. Holt residence, under surveillance (Tr. 155–158, 161, 162, 164–165, 169–172, 175–178, 256–258, 275–278, 310–312, 355–358).

On May 15, 1959, the federal officers, under a search warrant, investigated petitioner Fuller Holt's premises. The officers found 1,200 gallons of apple pomace in one barn and 680 pounds of sugar in another (Tr. 180, 317). Also found on the premises were 1,600 pounds of corn malt (Tr. 180).

That same day, other federal officers, under a search warrant, executed a search on petitioner E. D. Holt's premises (Tr. 281). Thirty gallons of non-tax-paid whiskey were found in a bedroom of the E. D. Holt home, and 450 gallons were found across the road from the house (Tr. 276–277, 281–282, 291). The officers also found 1,480 pounds of sugar and 800 pounds of rye meal in the same bedroom where the whiskey was found (Tr. 281–283). Also on the premises were hogshead barrels, coke, an old upright boiler, and hose similar to that used on the Cicero Wright still (Tr. 283–285).

At the trial, six of the thirteen defendants took the stand, including petitioners Fuller Holt (Tr. 519–545) and Mrs. E. D. Holt (Tr. 454–502). None of these witnesses claimed any entrapment on the part of either Padgett or the government, but rather denied any wrongdoing whatsoever (Tr. 427–545).

ARGUMENT

1. The petitioners argue that the government should be estopped from prosecuting them because Padgett, a co-conspirator, was being paid by the government to gather information concerning the illegal manufacture of whiskey. But it is clear that at no time did Padgett, either on his own volition or under governmental inducement, approach the petitioners with any scheme to manufacture moonshine whiskey. To the contrary, it is plain from the evidence (see the Statement, *supra*, pp. 3–5) that, in each instance, Padgett's aid was solicited by either petitioner E. D. Holt or his brother, petitioner Milton James Holt (Tr. 33–37, 49, 57–60, 89, 549). In fact, Padgett's aid was first solicited approximately one month before Padgett contacted the internal revenue agents and before he was paid for the information concerning the illegal still (Tr. 33–37). The government did not pay Padgett for his acts in engaging in the liquor business; it paid him for information he supplied about activities for which he was hired by the petitioners. The short of it is that the government did not induce innocent people to engage in wrongdoing but merely allowed a crime already in progress to continue until its full extent was revealed. Action of that type is proper governmental activity. *Sherman* v. *United States*, 356 U.S. 369, 373; *United States* v. *Roett*, 172 F. 2d 379, 381 (C.A. 3), certiorari denied, 336 U.S. 960; *Murray* v. *United States*, 250 F. 2d 489, 492 (C.A. 9), certiorari denied, 357 U.S. 932.

2. The claim that the evidence showed three conspiracies, rather than one as charged in the indictment, is wholly without merit. There was one general enterprise directed to violation of the laws relating to distilled spirits, using such still sites as were convenient. The fact that new members came into the conspiracy, or that old members withdrew, does not affect the finding of a single conspiracy where, as here, a common direction runs throughout. *Marino* v. *United States,* 91 F. 2d 691, 696 (C.A. 9), certiorari denied, 302 U.S. 764; *Lefco* v. *United States,* 74 F. 2d 66, 68 (C.A. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
BRUNO COLAPIETRO,
Attorneys.

JUNE 1961.